BY DAVID D. DODGE

Ethical Probate Practice

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All you probate and estate types: Listen up. The ABA Standing Committee on Ethics and Professional Responsibility recently issued a formal ethics opinion that discusses the ethical problems frequently encountered in the representation of estates.[1] Several scenarios are discussed and need to be considered separately.

Scenario 1. *Your client asks you to serve as personal representative of the will that you are preparing for him.*

Clients frequently ask their lawyers to be personal representatives and trustees because they are family friends and are familiar with their clients' circumstances and wishes regarding who in the family should get what and when.

It's all right to say "yes" as long as you satisfy your obligations under ER 1.4(b).[2] This is the rule that requires you to explain a matter to the extent reasonably necessary to permit the client to make an informed decision regarding the representation. This means that you need to explain to the client the tasks to be performed by the personal representative, the skills desirable for that task, the kinds of individuals or entities likely to do this job most effectively, and the benefits of using third parties or financial institutions in providing these services, including the relative costs.[3]

Scenario 2. *While serving as the personal representative or trustee of an estate, you wish to appoint your law firm to represent you in your capacity as fiduciary.*

There's no problem here either, because the dual roles of you as fiduciary and your firm as its lawyer do not involve a conflict of interest.[4] The ABA Opinion cautions, however, that the amount of compensation paid you and your firm for services in each capacity must be reasonable as required by ER 1.5 (Fees).

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Scenario 3. *While serving as the personal representative of an estate, you or your law firm is asked to represent either a beneficiary or a creditor of the estate or trust.*

Watch out for this one. The ABA Opinion warns that it is not reasonable for a lawyer to conclude that he can provide competent and diligent representation of a beneficiary or creditor against an estate or trust of which he is a fiduciary, even with the consent of everybody concerned.

If you ever find yourself in this position, read *In re Estate of Fogleman*,[5] an Arizona case in which a lawyer who was the personal representative of the estate was also a partner in the law firm that represented several creditors of the estate. The result was predictably disastrous.

You and your firm, however, may represent a creditor or beneficiary in an unrelated matter so long as you obtain the informed consent of all concerned, confirmed in writing. In these situations, always consider urging the creditor or beneficiary to retain independent counsel. Remember that you will be "under the microscope" in this kind of representation, and a nonclient beneficiary will question any deference you give to another beneficiary that has become your client. So although dual representation here may be ethical, it may not be very smart.

Lawyers frequently serve in dual roles in the probate and estate area, and the considerations found in the ABA Opinion will assist the lawyer in avoiding ethical pitfalls.

Ethics Opinions are available at www.azbar.org/EthicsOpinions

endnotes

1. ABA Standing Commission on Ethics and Professional Responsibility, Formal Opinion 02-426 (May, 31, 2002).
2. Rule 42, ARIZ.R.S.CT.
3. ERs 1.8(c) (prohibition against lawyer providing gifts for himself) and 2.1 (exercise of independent judgment) also may be relevant here: *see* Opinion No. 9607, Committee on the Rules of Professional Conduct, State Bar of Arizona (March 20, 1996)
4. ER 1.7 (Conflict of Interest: General Rule), and see Commentary to ER 1.7 at "Other Conflict Situations," now labeled "Nonlitigation Conflicts."
5. 3 P.3d 117 (Ariz. 2000).